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In the

Supreme Court of the United States

THELMA YOUNG,

Petitioner,

-v.-

WESTCHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES and JUDY HAGEN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN BERGSTEIN
Counsel of record

THORNTON, BERGSTEIN & ULLRICH, LLP
Attorneys for Petitioner
15 Railroad Avenue
Chester, New York 10918
(845) 469-1277

43pp

QUESTION PRESENTED

Whether the Second Circuit Court of Appeals ignored Supreme Court and inter-Circuit authority in holding that petitioner did not have a protected disability when she requested a reasonable accommodation from her employer which knew about her serious respiratory problems caused by a chemical accident?

LIST OF PARTIES

The parties are Thelma Young, plaintiff-petitioner, and Westchester County Department of Social Services and Judy Hagen, defendants-respondents.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Thelma Young respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Court of Appeals' opinion is reported at 2003 U.S. App. LEXIS 1915 and is reproduced in the Appendix at A-1. The district court's opinion is unreported and is reproduced in the Appendix at A-7.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on February 3, 2003. Pursuant to Supreme Court Rule 13.1, this petition is filed within 90 days of the date of entry. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

"No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112.

"As used in this Act: . . . (2) The term 'disability' means, with respect to an individual — (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or C) being regarded as having such an impairment." 42 U.S.C. § 12102.

STATEMENT OF THE CASE

A. *Plaintiff's disability*

On March 31, 1998, Thelma Young was injured due to a chemical explosion in a building near her office at Westchester Department of Social Services (DSS) in Yonkers, New York, where she worked as a claims examiner. (A-8). Young immediately sought medical assistance and her treating physicians uniformly diagnosed her as suffering significant restrictions to her larynx, limiting her speaking capacity. As the district court concluded, a pulmonary specialist "diagnosed her as suffering from a hyper-sensitivity reaction with rhinitis and hoarseness as a result of the inhalation of chemical fumes." (A-9).

Respondents first learned about Young's disability in April 1998, when medical records indicated she had serious respiratory problems resulting from chemical exposure. In a note dated April 17, 1998, Young's doctor wrote that "[s]he has had a hypersensitivity reaction" and that she would "try" to return to work in a week. (JA-119).[1] The following month, Young's doctor wrote that this claims examiner (who spent much of her time speaking with clients) should "rest her voice" and "will not be able to return to work until further notice." (JA-126). In June, her doctor wrote that Young was "having complications and is still under medication" and could return to work in July for light duty. (JA-127). However, in August, Young's doctor advised that her "condition is very critical in that she cannot use her . . . voice. She must absolutely rest her voice." The note added that she must "stay home another two weeks while [the doctor] evaluates her condition." (JA-129). Young's physician scheduled surgery for August 27, 1998. (JA-130). On December 2, 1998, Young's doctor wrote that she was "diagnos[ed] with inhalation of

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[1] JA-___ refers to the Joint Appendix in the Court of Appeals.

chemical fumes. Ms. Young has gone through extensive treatment and surgery." (JA-133). The date when Young could return to work was again delayed to December 14, 1998. *Id.*

Despite medical treatment, Young's condition did not improve. In April 1999, Young's doctor wrote that the treatment "has not helped her at all. She is still suffering with burning & itchy eyes, hoarseness, itchy scalp, any exposure to skin is affected, tightness in chest, hard to breath[e], drow[s]iness, and dr[y]ness of nose." The doctor recommended that Young be "relocated to a healthier environment." (JA-137). In June 1999, her doctor wrote, "Please be advised that Thelma Young is currently under my care for severe chronic obstructive pulmonary disease and obstructive airway disease. I have been treating Ms. Young with multiple medications and it has not helped her, she is still suffering from cough and shortness of breath she is also wheezing and has tightness in the chest. It is my opinion that the surroundings in her work area is affecting and making her condition worse. I feel that by relocating Ms. Young to a healthier environment would improve her medical condition immensely." (JA-424).

B. *Young's accommodation requests*

After her treating physician cleared her to do so, Young sought to return to work light duty in early July 1998. The agency personnel office barred Young, claiming she was unable to perform the essential elements of her job. (JA-319).

While Young could not use her voice in a normal manner, respondents could have accommodated her by assigning significant backlogs of written work. Young testified, "I could have done all the write-ups on the re-certifications, and I could have done the authorizations on the 3209s, authorized the benefits for the clients. I could have opened cases like the food stamps or Medicaid that sometimes we have to do. There were numerous things that I could have done in the unit without having to do vocalization." (JA-341).

After she was denied light duty, in August 1998, Young requested a transfer to another DSS work location to avoid continuing exposure to the noxious fumes which permeated the Yonkers site. She told the Department's Associate Commissioner that the noxious smells prevented her from returning to that office. (JA-320). The agency did nothing. Likewise, when Young requested a transfer on December 24, 1998, the agency failed to respond. (JA-415).

In February 1999, after returning to work from a tonsillectomy two months earlier, Young again submitted a written transfer request. (JA-416). Although Kathleen Waluschka, a third line manager, assured Young she would receive a transfer to Mount Vernon, a week later, Waluschka informed Young the Associate Commissioner had vetoed her transfer without explanation. (JA-320–21).

Between April 29 and mid-June 1999, appellant's doctors and legal counsel repeatedly supported Young's transfer requests. (JA-417, 420, 424). On May 3, 1998, Young submitted another transfer request, noting as her reason, "[C]ontinuation of Chemical fumes, overuse of perfumes, cleaning materials, acetate smells, smell of burning rubber and tar smells which permeates all areas of the buildings. My eyes itch, nose and throat burn, cough constantly due to dust and smells within this building. Tightening of chest." (JA-418). The agency still took no action and failed to respond to her requests for an explanation of her status. (JA-419).

Respondents required an employee desiring a transfer to fill out a form and obtain a supervisor's signature. The employee would then submit this request to the central office. (JA-327). At deposition, agency witnesses could not explain the priority given to such requests, but admitted the department had no practice of prioritizing consideration to employees in need of such transfers to accommodate disabilities. Indeed, in the late winter 1999, while denying Young

a transfer, the agency laterally transferred other employees in Yonkers to eligibility examiner positions in nearby White Plains for which Young qualified. (JA-322).

In explaining why Young was not transferred, the Director of Personnel claimed "she had problems of having poor performance evaluations." (JA-328, 448). This was untrue, as Young's performance evaluations were all at least satisfactory. (JA-343–368).

Respondents' failure to accommodate Young had adverse consequences. Between May 22 and December 14, 1998, the County paid her no salary and denied her medical benefits. (JA-404). Had Young been permitted to work light duty in early July 1998, as she was medically cleared to do, she would not have suffered this substantial financial loss.

In addition, by not transferring Young to another work location, the agency effectively coerced her to return to the unhealthy Yonkers' location or risk losing her job. And, as the June 16, 1999 letter from her doctor recites, "Please be advised that Thelma Young is currently under my care for severe chronic obstructive pulmonary disease and obstructive airway disease. I have been treating Ms. Young with multiple medications and it has not helped her, she is still suffering from cough and shortness of breath. She is also wheezing and has tightness in the chest. It is my opinion that the surroundings in her work area [are] affecting and making her condition worse. I feel that by relocating Ms. Young to a healthier environment would improve her medical condition immensely." (JA-424).

C. *The decisions below*

At the close of discovery, the district court granted summary judgment. While the court dismissed the Americans with Disabilities Act claim, it held that Young had a protected disability because "her physical impairments substantially limited her ability to speak and breath[e] from March 31,

1998 through at least June 1999." (A-15). Specifically, the Court ruled, "[t]he evidence currently before the Court demonstrates that a genuine issue of material fact exists regarding whether Plaintiff's major life activities were substantially limited. The expert medical evidence certainly indicates that Plaintiff's conditions were (and may still be) significant in nature, so that a reasonable jury could conclude that Plaintiff could not speak or breath[e] like the average person. And while it is a close call whether her ailments lasted long enough to be considered ADA disabilities, this Court can not say as a matter of law they were too temporary. This is because as of June 16, 1999 — one year after the chemical explosion — Plaintiff's doctor, Dr. Joseph Brill, stated that Plaintiff suffered from 'severe chronic obstructive pulmonary disease and obstructive airway disease.' " (A-16).

However, on appeal, while the Second Circuit affirmed the grant of summary judgment, it did so on different grounds, holding that "Young's reasonable accommodation claim fails before even reaching the 'essential functions' question, because she provides no evidence that the County knew she had a disability at the time it took the alleged adverse actions." (A-3). The Court stated that "[a] defendant cannot be liable under the ADA unless it had information at the time of its pertinent decisions that would have permitted a reasonable employer to conclude that the plaintiff was, in fact, disabled." (A-3). While the Second Circuit noted that "[t]he County knew, as early as April of 1998, that Young had trouble breathing and speaking," it held that "[b]oth Young's doctors and the County's doctor, however, emphasized that these problems were temporary, and repeatedly projected that Young would be able to return to work shortly. Thus, the County had every reason to believe that Young was simply suffering from a short-term injury or illness, not a 'disability.' " (A-3).

In addition, while the Court of Appeals held that "some symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability," Young did not fall under this exception because she asked only to return to work, subject to "light duty," or to transfer because her supervisor was spraying perfume in the workplace, irritating her condition. "Her symptoms could have been explained as easily by a sinus or tonsil infection as by some ongoing long-term ailment, particularly considering her doctors' continual assurances that she could soon return to work." (A-4).

REASONS FOR GRANTING CERTIORARI

THE SECOND CIRCUIT'S ORDER AFFIRMING SUMMARY JUDGMENT IGNORES THIS COURT'S RECENT PRONOUNCEMENTS ON WHEN A DISABILITY QUALIFIES AS "SUBSTANTIAL" UNDER THE AMERICANS WITH DISABILITIES ACT AS WELL AS PRECEDENTS FROM OTHER CIRCUITS

The Americans with Disabilities Act prohibits covered entities like respondent from discriminating against qualified employees because of their protected disabilities. 42 U.S.C. § 12101. "A 'disability' is defined as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or C) being regarded as having such an impairment." 42 U.S.C. § 12102 (2).

Last year, this Court clarified the definition of "disability" under the ADA, holding that it consists of a "substantial" and not a minor limitation on major life activities, *i.e.*, those "that are of central importance to most people's daily lives." *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184, 197 (2002). The impairment's impact must also be "permanent or long-term." *Id.*

This Court reasoned, "[o]ur consideration of this issue is guided first and foremost by the words of the disability definition itself. 'Substantially' in the phrase 'substantially limits' suggests 'considerable' or 'to a large degree.' *The word 'substantial' thus clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities.*" *Id.* at 196-97 (emphasis supplied). *See also, id.* at 198 ("[w]e therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term").

In affirming summary judgment, the Second Circuit held that Young failed to proffer evidence establishing that her employer knew she had a disability under the ADA. The Court added that while some "symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability," Young did not fall under this exception because she asked to work light-duty and her symptoms "could have been explained as easily by a sinus or tonsil infection *as by some ongoing long-term ailment*, particularly considering her doctors' continual assurances that she could soon return to work." (A-4) (emphasis supplied).

As the Court of Appeals held that an employer could deem Young's ailment an "ongoing long-term ailment," that Court should have remanded the case for trial under *Toyota*. Indeed, in denying summary judgment on this issue, the district court held that "a genuine issue of material fact exists regarding whether Plaintiff's major life activities were substantially limited. The expert medical evidence certainly indicates that Plaintiff's conditions were (and may still be) significant in nature." (A-16). The district court further concluded that it "was a close call whether [Young]'s ailments lasted

long enough to be considered ADA disabilities." (A-16). On this issue, the district court correctly interpreted the ADA, and the Second Circuit's departure from *Toyota* warrants certiorari, particularly since the evidence confirms that Young's doctors repeatedly made it clear that she suffered from a serious respiratory ailment and was unable to perform her duties.

Moreover, inter-Circuit decisions conflict with the Second Circuit's holding that Young did not establish her employer knew she suffered from a disability when she sought an accommodation. In *Pollard v. High's of Baltimore*, 281 F.3d 462 (4th Cir. 2002), the Fourth Circuit noted that even temporary physical conditions may constitute disabilities under the statute. *See*, *id.* at 468-69 ("while the presumption exists that temporary impairments do not qualify as disabilities under the ADA, temporary conditions still require a case-by-case evaluation under the Act. Temporary disabilities present a spectrum of cases and at some point the duration of an impairment could be so long that it cannot properly be characterized as temporary") (citing *Toyota*, 122 S. Ct. at 692; *Sutton v. United Air Lines*, 527 U.S. 471, 483 (1999); *Ennis v. National Association of Bus. & Educ. Radio*, 53 F.3d 55, 59-60 (4th Cir. 1995)). *See also*, *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 877 (9th Cir. 1989) (interpreting a comparable state disability law, the Ninth Circuit held that "as long as the employer is on notice that an employee suffers from a serious medical condition, it may be liable under the handicap discrimination law"). In addition, the Seventh Circuit has held that "some symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability." *Hedberg v. Indiana Bell Telephone*, 47 F.3d 928, 934 (7th Cir. 1995).

Toyota and the inter-Circuit cases cited above compel the grant of certiorari. Under *Toyota*, a reasonable jury could find that management knew or should have known at the time of her accommodation request that Young's disability was serious, thereby qualifying for ADA protection. Respondents knew she had suffered the ill effects of a chemical explosion near her office and, on the basis of her doctors' notes, began experiencing respiratory and related ailments that prevented her from working, much less discharging her specific job responsibilities: interviewing and contacting DSS clients. The Fourth Circuit's instruction in *Pollard*, 281 F.3d 468-69 ("the duration of an impairment could be so long that it cannot properly be characterized as temporary") required a different outcome as the employer plainly knew that Young's absence from work was lengthy. Likewise, the Seventh Circuit's counsel in *Hedberg* compelled a different outcome because Young's respiratory ailment was "obviously [the] manifestation[ ] of an underlying disability." 47 F.3d at 934. Indeed, as the Second Circuit noted, "[t]he County knew, as early as April of 1998, that Young had trouble breathing and speaking." (A-3).

While the Court of Appeals further concluded that doctors "emphasized that these problems were temporary, and repeatedly projected that Young would be able to return to work shortly" (A-3), the question is not whether the condition is "temporary" but whether the employee suffers from a disability. *See*, *Hedberg*, 47 F.3d at 932 ("An employer cannot be liable under the ADA for firing an employee when it indisputably had no knowledge of the disability. . . . At the most basic level, it is intuitively clear when viewing the ADA's language in a straightforward manner that an employer cannot fire an employee 'because of' a disability unless it knows of the disability"); *Gantt v. Wilson Sporting Goods*, 143 F.3d 1042, 1046 (6th Cir. 1998) ("it is 'unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise

qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business' ") (citing 29 C.F.R. § 1630.9 (a) (emphasis supplied)).

Here, the record establishes that Young's doctors continued to emphasize how the chemical exposure had debilitated her. As early as April 1999, Young's doctor wrote the treatment "hàs not helped her at all. She is still suffering with burning & itchy eyes, hoarseness, itchy scalp, any exposure to skin is affected, tightness in chest, hard to breath[e], drow[s]iness, and dr[y]ness of nose." The doctor recommended that Young be "relocated to a healthier environment." (JA-137). A rational jury could find that respondents had every reason to expect that Young's condition would be substantial and long-term in that the impairments seriously interfered with her duties. Indeed, Young's doctor soon thereafter advised that petitioner be relocated to a different work location because of her condition. *See*, *Sutton*, 527 U.S. at 483 ("[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual") (citing 29 C.F.R. pt. 1630, App. § 1630.2(j)).

CONCLUSION

This Honorable Court should grant the instant petition for certiorari.

Dated: April 29, 2003

Respectfully submitted,

STEPHEN BERGSTEIN
Counsel of record

THORNTON, BERGSTEIN & ULLRICH, LLP
Attorneys for Petitioner
15 Railroad Avenue
Chester, New York 10918
(845) 469-1277

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 3rd day of February, two thousand three.

PRESENT: HONORABLE JON O. NEWMAN
HONORABLE ROBERT A. KATZMANN,
HONORABLE REENA RAGGI,

Circuit Judges.

THELMA YOUNG,

Plaintiff-Appellant,

Summary Order
No. 02-7706

-v.-

WESTCHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES and JUDY HAGEN,

Defendants-Appellees.

Appearing for Plaintiff-Appellant Thelma Young:

MICHAEL H. SUSSMAN, Law Offices of Michael H. Sussman, Goshen, New York.

Appearing for Defendants-Appellees Westchester County Department of Social Services and Judy Hagen:

MARY LYNN NICOLAS, Senior Assistant County Attorney (Stacey Dolgin-Kmetz, Chief Deputy County Attorney, of counsel) for CHARLENE M. INDELICATO, County Attorney for the County of Westchester, White Plains, New York.

UPON DUE CONSIDERATION of this appeal from the United States District Court for the Southern District of New York (Brieant, Charles L., *J.*), it is hereby

ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is **AFFIRMED**.

In this appeal, the Plaintiff, Thelma Young, challenges the decision of the District Court granting the motion of the Defendants, Westchester County Department of Social Services ("the County") and Judy Hagen, for summary judgment, as to all of Young's claims. We will affirm, but for reasons somewhat different than those given by the District Court. *See Adirondack Transit Lines, Inc. v. United Transp. Union, Local 1582*, 305 F.3d 82, 88 (2d Cir. 2002) (holding that court may affirm on any basis supported by the record on appeal). We review the District Court's decision to grant summary judgment de novo. *See Rogers v. City of Amsterdam*, 303 F.3d 155, 158 (2d Cir. 2002).

A. Reasonable Accommodations

Claims under Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq., follow the familiar path of *McDonnell-Douglas* burden-shifting. *See Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 49, 54 (2d Cir. 2002). "For a plaintiff who can perform a desired position with a reasonable accommodation to establish a prima facie case of discrimination because of disability, she must show '(1) that [s]he is an individual who has a disability within the meaning of the [ADA], (2) that an

employer covered by the statute had notice of h[er] disability, (3) that with reasonable accommodation, [s]he could perform the essential functions of the position sought, and (4) that the employer has refused to make such accommodations.'" *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 216 (2d Cir. 2001) (quoting *Stone v. City of Mt. Vernon*, 118 F.3d 92, 96-97 (2d Cir. 1997)) (alterations in original).

Young's reasonable accommodation claim fails before even reaching the "essential functions" question, because she provides no evidence that the County knew she had a disability at the time it took the alleged adverse actions. A defendant cannot be liable under the ADA unless it had information at the time of its pertinent decisions that would have permitted a reasonable employer to conclude that the plaintiff was, in fact, disabled. *See Bartlett v. N.Y. State Bd. of Law Examiners*, 226 F.3d 69, 85–86 (2d Cir. 2000) (citing *Heilweil v. Mt. Sinai Hosp.*, 32 F.3d 718, 725 (2d Cir. 1994)); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 932–33 (7th Cir. 1995). The County knew, as early as April of 1998, that Young had trouble breathing and speaking. Both Young's doctors and the County's doctor, however, emphasized that these problems were temporary, and repeatedly projected that Young would be able to return to work shortly. A key aspect of a "disability" under the ADA is that it is "'permanent or long-term.'" *RECAP*, 294 F.3d at 46–48 (quoting *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 122 S. Ct. 681, 691 (2002)). Thus, the County had every reason to believe that Young was simply suffering from a short-term injury or illness, not a "disability."

The County therefore was not on notice that it was obligated to comply with the ADA's requirements. We see little sense in holding a defendant liable for failing to do what it had no reason to know was required. At the same time, we agree that "some symptoms are so obviously manifestations

of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability." *Hedberg*, 47 F.3d at 934.

Young, however, does not fall under this exception. She asked only to return to work, subject to "light duty," or to transfer because of "perfumes." Her symptoms could have been explained as easily by a sinus or tonsil infection as by some ongoing long-term ailment, particularly considering her doctors' continual assurances that she could soon return to work. The first indication the County had that Young might have a "disability" was on June 16, 1999, when she submitted the diagnosis of "severe chronic obstructive pulmonary disease and obstructive airway disease." Therefore, her claims based on any of the Defendants' actions prior to that date must be rejected. *See Heilweil*, 32 F.3d at 725 (holding that discovery of plaintiff's serious sinus condition subsequent to employer's challenged decisions was not probative of whether she was a "handicapped person" under the relevant statute).

Young offers no evidence that the County failed reasonably to accommodate her after June 16, 1999. By that time, she had returned to work. Although she was not transferred until November 3, 1999, there is no evidence in the record that there was an open position available between June and November. Accordingly, we agree with the district court that summary judgment was appropriate on Young's reasonable accommodation claims.

B. ADA Retaliation

In order to establish a prima facie case of retaliation under the ADA, a plaintiff must "show 'that it was engaged in protected activity, that the defendant was aware of this activity, that defendant took adverse action against the plaintiff, and a causal connection exists between the protected activity and the adverse action, i.e., that a retaliatory motive played a part

in the adverse employment action.'" *RECAP*, 294 F.3d at 54 (quoting *Sands v. Runyon*, 28 F.3d 1323, 1331 (2d Cir. 1994) (internal alterations omitted)). The District Court granted summary judgment on Young's ADA retaliation claims, holding that the retaliatory conduct she alleged was not covered under the statute because it was not "materially adverse." We will again affirm on a slightly different basis, here, that no reasonable juror could have found a causal relationship between Young's protected activities and any non-trivial adverse actions directed against her.[1]

Young has not submitted any evidence to suggest that there is a causal relationship between her requests to return to work, or to transfer, and the disciplinary measures and delayed transfers to which she alleges she was subjected. Ordinarily, causality can be inferred from the fact that "'the protected activity was closely followed in time by the adverse action.'" *Lovejoy-Wilson*, 263 F.3d at 224 (quoting *Cifra v. Gen. Elec. Co.*, 252 F.3d 205, 216 (2d Cir. 2001)). However, where the adverse action was already ongoing at the time of the protected activity, or is very similar to another adverse action that was taken before the protected activity, with no other change in relevant circumstances, logic precludes any inference of causation. *See Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001). Young had already had a transfer request pending since March of 1997 at the time she requested her accommodations. Absent evidence that suitable positions were unavailable during that period, but available during late 1998 and 1999, it is hard to see how any failure to transfer Young could have been related to her protected activities. Similarly, the disciplinary proceedings Young complains of all began well before she began to ask to return to work. In any event, Young maintained that the main

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[1] Because we conclude that Young cannot demonstrate a causal relationship between her protected activities and the actions allegedly directed against her, we need not reach the question of materiality today.

perpetrator, her supervisor, Hagen, had harassed her "from the very beginning," more than a year before Young left work. When asked whether she attributed the hostility she perceived at her workplace "to the A.D.A.," Young replied, "No, that was going on for quite a while." Young offers no evidence, other than relative nearness in time, to link the allegedly adverse actions to her protected activities. Under these circumstances, we conclude, there is no reasonable inference that the two sets of events were causally related.

C. Other Claims

We have considered Young's remaining claims, and found them to be without merit. We see nothing whatsoever in the record to support an inference that any of Young's treatment was based upon her race. *See, e.g., Alfano v. Costello*, 294 F.3d 365, 378 (2d Cir. 2002) (refusing to consider facially neutral employment incidents without "some circumstantial or other basis for inferring that incidents sex-neutral on their face were in fact discriminatory"). Although some white employees did manage to move between County offices, so, too, did some African-American candidates. Finally, we agree with the District Court that, in light of Young's failure to request leave to serve a late notice of claim, the New York state law claims were properly dismissed. *See Mills v. Monroe County*, 451 N.E.2d 456, 59 N.Y.2d 307, 312 (1983).

Conclusion

For the reasons stated above, the judgment of the District Court is hereby Affirmed.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THELMA P. YOUNG,

Plaintiff,

-against-

WESTCHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES and JUDY HAGEN,

Defendants.

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00 Civ. 5987 (CLB)

MEMORANDUM & ORDER

Plaintiff, Thelma Young, an African-American female, commenced this action under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* and 42 U.S.C. § 1983 alleging that Defendants, Westchester County Department of Social Services (the "Department") and Judy Hagen, Plaintiff's supervisor, discriminated against her in her employment based on her disability of laryngitis and lung congestion allegedly caused by conditions at her workplace, and based on her race. Plaintiff filed her original Complaint on August 14, 2000.

There are two motions for decision presently before the Court. By motion filed March 25, 2002, heard and fully submitted May 10, 2002, Plaintiff moves for an Order pursuant to Fed. R. Civ. P. 15(a) permitting her to file an amended complaint. Plaintiff seeks to add an additional employment discrimination claim under Section 296 of the New York State Executive Law. By motion filed March 28, 2002, heard and fully submitted May 10, 2002, Defendants move pursuant to Fed. R. Civ. P. 56 for an Order granting them summary judgment. The Court will treat Defendants' summary judgment motion as if made toward the amended complaint.

Background

The following facts are not in dispute, or are assumed for purposes of the motion, as most favorable to the non-moving party. Plaintiff Thelma Young worked as an Eligibility Examiner for Defendant Westchester County Department of Social Services, in the Homeless Undercare Unit of its Yonkers District Office from September 1991 through November 1999.[1] All staff in the Unit, except for Defendant Judy Hagen, were African-American or Hispanic. In November 1999, at her own request, Plaintiff was transferred to the Department's White Plains District Office. The Yonkers District Office is located at 137 Alexander Street, Yonkers, New York, which is an industrial site near several chemical and industrial plants. Defendant Judy Hagen is a white female who served as Plaintiff's supervisor in Yonkers from March, 1997 through March, 1999. Plaintiff and Ms. Hagen do not get along. As an Eligibility Examiner in the homeless unit, Plaintiff's main responsibilities are to determine the eligibility of homeless applicants and recipients for public assistance benefits, and to assist clients in obtaining benefits to which they are entitled. To perform these functions, Plaintiff must interview the applicants, either in person or by telephone, explain verbally the audit process to them, inform them verbally about their duties with respect to the process, and advise them verbally of the Department's available services. Plaintiff's job duties also include processing relocations for clients, as well as authorizing rent, security, broker's fees, and furniture allowances for clients who have secured replacement housing; handling intricate budget problems; authorizing cash benefits, food stamps, and medical assistance for eligible client on request; and making budget corrections, responding to audits, and implementing undercare changes for homeless persons, as circumstances require.

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[1] She as been employed by the Department since November 1989.

On March 31, 1998, while Plaintiff worked at the Yonkers District Office, a chemical explosion occurred at the nearby Patclin Chemical Plant. The Plaint is located in a building adjacent to the Yonkers District Office. Immediately after the explosion, Plaintiff experienced burning in her eyes, nose and throat, and that day sought treatment at St. John's Riverside Hospital in Yonkers.[2] Thereafter on April 3, 1998, she obtained out-patient treatment from Dr. Joseph Murray ("Dr. Murray"), an ear, nose and throat specialist. Dr. Murray diagnosed Plaintiff as having swollen vocal cords and instructed Plaintiff to rest her voice and drink plenty of fluids. Over the next two weeks, Dr. Murray examined Plaintiff two more times. Dr. Murray ultimately diagnosed Plaintiff with laryngeal inflammation and recommended that she consult with a pulmonary specialist. Plaintiff has smoked at least one pack of cigarettes a day for 25-30 years. The pulmonary specialist, Dr. Renee Giometti ("Dr. Giometti"), examined Plaintiff on April 17, 1998 and diagnosed her as suffering from a hypersensitivity reaction with rhinitis and hoarseness as a result of the inhalation of chemical fumes. Dr. Giometti directed Plaintiff to rest her voice and not to return to work until her symptoms abated.

Plaintiff was next examined on April 27, 1998 by an otolaryngologist, Dr. S. Singh Malhotra ("Dr. Malhotra"), who diagnosed her as having acute laryngitis and sinusitis. Dr. Malhotra concurred with Dr. Giometti's recommendations for treatment. On April 28, 1998, Dr. Harvey Goldstein ("Dr. Goldstein"), another otolaryngologist, examined Plaintiff. He did so at the Department's instruction. Dr. Goldstein concurred with Plaintiff's doctors and opined that it would be difficult for Plaintiff to continue at work. He did however state she could return to work in two weeks.

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[2] Plaintiff was not admitted to the hospital at this time, nor given any prescriptions and/or restrictions.

Dr. Malhotra again examined Plaintiff on May 7, 15 and 28, 1998 and in doing so, he reasserted Plaintiff's inability to return to work. On June 11, 1998, Dr. Malhotra performed a sinusotomy on Plaintiff to repair her sinus passages. After the procedure, Dr. Malhotra informed Plaintiff that by July 7, 1998 she should be able to return to work on "light duty." Thus, Plaintiff asked the Department if she could return to work on light duty. Because Plaintiff failed to specify what specific duties would be appropriate and because a light duty assignment would involve Plaintiff performing functions not involving her voice, the Department declined her request. According to the Department, such an assignment would have resulted in Plaintiff only performing the non-essential functions of her job, which it claims she was cleared to perform on at least ten different occasions by five different doctors.[3] Defendants contend that Ms. Hagen had no personal involvement with the Department's decision to deny Plaintiff's request for light duty and there is no evidence submitted to the contrary. Plaintiff submitted letters to the Defendants on July 23, 1998 and August 6, 1998 signed by Dr. Malhotra, stating that Plaintiff was still under his care and that Plaintiff would likely be able to return to work in several weeks.

On August 4, 1998, while still out on sick-leave, Plaintiff claims that she asked Defendants to transfer her to another district office. Department employees may apply for transfers by completing a form and submitting it to the Department Personnel Office through their immediate supervisors. These supervisors cannot approve or disprove their subordinates' transfer requests. Rather they may only receive the form, initial it and forward it to the manager and Deputy Commissioner. Transfer requests are analyzed in light of the Department's needs at the time of the request, the availability of a

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[3] Plaintiff contests this.

suitable position and the requesting employee's performance. Defendants dispute the claim that Plaintiff made a transfer request in August 1998.

Another way Department employees are transferred is when they bid for specific posted open positions within the Department. Craig Lebowitz and Mark DeNicholas were reassigned in or about April 1999 after they applied for positions that were posted at the Bureau of Case Review. Similarly, Tom Reiger, another Department Employee, submitted an application for a posted position and after an interview and evaluation, the Department reassigned him. Plaintiff did not apply for open positions when she made her transfer requests.

Plaintiff claims that soon after the Department denied her August transfer request, Defendant Hagen erroneously sent her memoranda and "Notices of Questioning" suggesting possible disciplinary action for failing to call in to work every day she was absent. Plaintiff contends that these memoranda and Notes were improper because Plaintiff had submitted doctors' notes explaining her absences. Defendants, however, contend that on the several occasions that Plaintiff was absent from work, known office policy required her to call Ms. Hagen no later than one half hour before starting time to advise that she would be out ill. Plaintiff did not make these required calls. Ms. Hagen did not personally file disciplinary charges against Plaintiff as a result. Instead, her supervisors instructed her to execute the memoranda and Notices of Questioning. On August 27, 1998, Plaintiff underwent a tonsillectomy and remained out of work until December 15, 1998, when she returned to her same position.

Plaintiff was absent from work from April 3, 1998 through December 14, 1998, with the exception of April 21, 1998, May 11-14, 1998, and August 4-5, 1998. During her absences, Plaintiff used her available accrued time and leave benefits, then applied for and received Extended Sick Leave benefits. These Benefits allow an employee to receive half pay for a

period not to exceed two weeks for each completed year of service. Plaintiff claims that as a result of the Department's refusal to accommodate her requests for light duty, she was out of work without pay during the time period between May 21, 1998 and December 14, 1998 and had to make payments in order to maintain her health insurance through the County.

Plaintiff returned to work on December 15, 1998, and on February 17, 1999 she again requested a transfer, claiming that odors associated with the Yonkers District Office aggravated her condition. One such odor was Defendant Hagen's perfume which she claims Ms. Hagen purposefully disseminated in the Office to aggravate her condition. Plaintiff also requested the transfer because of her personal conflict with Defendant Hagen. Plaintiff was not transferred at that time. Plaintiff submitted a doctor's note on April 30, 1999 further supporting her need to change job locations. Plaintiff made another request for transfer in May, 1999. On November 3, 1999, Plaintiff was transferred from the Yonkers to White Plains.[4]

Plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") on August 23, 1999. The EEOC issued her a right to sue letter on May 15, 2000. Thus on August 14, 2000, she commenced this lawsuit. In her Complaint Plaintiff alleges that Defendants violated her rights under the ADA by failing to accommodate her requests for a "light duty" position and failure "to timely provide her a transfer [to another department] or to treat her request for a transfer in a prioritized manner due to her condition." She alleges that these actions "constituted punishment for

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[4] Plaintiff subsequently suffered a "ripped disk" as a result of a fall at her new job location at 85 Court Street, White Plains and was out on disability at the time of her deposition on September 6, 2001. She had not worked for the Department since February 23, 2001, but stated that she was technically still a Department employee.

her disability and failure to reasonably accommodate Plaintiff's disability." Plaintiff seeks compensatory and punitive damages. Plaintiff also alleges that Defendants violated her rights under Title VII and the Fourteenth Amendment (equal protection) by discriminating against her based on her race and failing to treat her as others "similarly situated" in her department were treated with respect to transferring out to another job location within the Department.

Discussion

ADA Claim

To establish a *prima facie* case of disability discrimination Plaintiff must show: (1) that she is disabled; (2) that she is otherwise qualified to perform the job in question; and (3) that she suffered a termination or other adverse employment action because of her disability. *See Wernick v. Federal Reserve Bank of New York*, 91 F.3d 379, 383 (2d Cir. 1996). Defendants contend that Plaintiff cannot establish a *prima facie* ADA claim because (a) Plaintiff's impairments — laryngitis, lung congestion and related symptoms — do not constitute a disability under the ADA; (b) when Plaintiff lost the use of her voice she was no longer qualified to perform the essential functions of her position; (c) Plaintiff's impairment was merely temporary and (d) Plaintiff did not suffer an adverse employment action.

Disability

The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). Plaintiff claims that her laryngitis and lung congestion are physical impairments that substantially limited her ability to speak, walk and breath. Our Court of Appeal employs the three step formula implemented by the Supreme Court in *Bragdon v. Abbott*, 524 U.S. 624 (1998),

to determine whether an individual has a qualifying ADA disability. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 641 (2d Cir. 1998). First, it must be determined whether a plaintiff suffers from a physical or mental impairment. Second, the major life activity that the plaintiff complains is limited must be identified. Third, it must be determined if that major life activity is substantially limited by the plaintiff's impairment. *See id.*

The EEOC has promulgated regulations (the "Regulations") which define and interpret major terms under the ADA. A physical impairment under the Regulations is defined as "[a]ny physiological disorder, or condition cosmetic disfigurement, or anatomical loss affecting one ore more of the following body systems: neurological, musculoskeletal, special sense organ, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine." 29 C.F.R. § 1630.2(h)(1). Plaintiff suffers from physical impairments — laryngitis lung congestion and related symptoms — which affect her speech organs and ability to breath. Thus, she meets the first part of the three prong test.

The Regulations define "Major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *See* 29 C.F.R. §1630.2(i). Here, Plaintiff complains that her laryngitis and related symptoms limited her ability to speak, breath and walk. Pursuant to the Regulations, these are major life activities.

"Substantially limits" is defined under the Regulations as: (i) "[u]nable to perform a major life activity that the average person in the general population can perform"; or (ii) "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can

perform that same major life activity." 29 C.F.R. §1630.2 (j)(1). The Regulations state that the following factors should be considered when deciding whether a Plaintiff's major life activity was substantially limited: (i) nature and severity of the impairment; (ii) the duration of the impairment; and (iii) the permanent or long term impact resulting from the impairement. *See id.* at § 1630.2(j)(2). "This inquiry is individualized and fact-specific." *Colwell*, 158 F.3d at 643.

Plaintiff contends and this Court assumes that her physical impairments substantially limited her ability to speak and breath from March 31, 1998 through at least June 1999. With respect to speaking, Plaintiff states she was so limited that she could not "speak in anything approaching a normal manner or for a normal duration when compared to others in the general population." With respect to breathing, Plaintiff contends that her ailments coupled with the noxious odors in the Yonkers District Office (including Hagen's perfume) created "significant respiratory problems." She relies on her doctors notes precluding her from returning to work on full duty, doctors notes explaining her conditions and diagnosis to her employer and stating that medication was not helping, and her testimony wherein she states that she could only maintain her voice for limited periods of time and today still suffers from hoarseness and shortness of breath. Defendants contend however, that Plaintiff's ability to speak and breath were not substantially limited, as required for ADA liability, because during the relevant time period, which they contend was only March 1998 through December 1998, Plaintiff went to dinner and socialized with friends and family on several occasions, attended football games (but was unable to yell and cheer), spoke on the phone and returned to work for several days. Defendants also contend that Plaintiff's inability to speak and breath were too temporary to be deemed disabilities for ADA purposes.

The evidence currently before the Court demonstrates that a genuine issue of material fact exists regarding whether Plaintiff's major life activities were substantially limited. The expert medical evidence certainly indicates that Plaintiff's conditions were (and may still be) significant in nature, so that a reasonable jury could conclude that Plaintiff could not speak or breath like the average person. And, while it is a close call whether her ailments lasted long enough to be considered ADA disabilities, this Court can not say as a matter of law they were too temporary. This is so because as of June 16, 1999 — one year after the chemical explosion — Plaintiff's doctor, Dr. Joseph Brill, stated that Plaintiff suffered from "severe chronic obstructive pulmonary disease and obstructive airway disease."

Plaintiff contends that her physical impairment also substantially limited her ability to walk. The record, however, is entirely devoid of evidence that Plaintiff was substantially limited in her ability to walk. The evidence demonstrates that Plaintiff was able to attend football games, go to dinner with friends and family "often", take a vacation to Florida and travel to Maryland during the relevant time period.

Essential Job Function

The next element Plaintiff must prove to make a *prima facie* ADA claim is that with or without her requested reasonable accommodation she is able to perform the essential functions of her job. The EEOC Regulations define "essential functions" as the "fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. § 1603.2(n)(1). The Regulations also provide that the following factors may be considered when determining what the essential job functions are: (i) the employer's judgment as to which functions are essential; (ii) written job descriptions; (iii) the amount of time spent on the job performing the function; (iv) the consequence of not requiring the individual to

perform the function; (v) the terms of the Collective Bargaining Agreement; (vi) the work experience of past incumbents in the job; and/or (vii) the current work experience of incumbents in similar jobs. *See* 29 C.F.R. § 1603.2(n)(2).

The record demonstrates that whether or not Defendants provided Plaintiff with the reasonable accommodation she requested (i.e., light duty assignment not involving the use of her voice), she would not have been able to perform her fundamental job duties. Speaking is fundamental to Plaintiff's ability to perform as an Eligibility Examiner. This is so because Plaintiff's fundamental job duties involved interviewing clients and collateral sources by telephone or in person to determine the applicants' and recipients' benefit eligibility, advising recipients and applicants verbally of the public assistance benefits available to them, explaining verbally the procedures of obtaining such benefits, and explaining verbally the audit process to them. Indeed, Plaintiff conceded in testimony at her deposition that 50-70% of her job duties required her to use her voice. Although she contends that her job also required her to perform functions not involving the use of her voice, these functions were not "essential job functions." Because she is unable to perform her fundamental job duties, Plaintiff can not prove a *prima facie* ADA claim; thus, Defendants are granted summary judgment with respect to that claim.

Retaliation Claim

In her Complaint, Plaintiff alleges that Defendants falsely accused of her of failing to submit required medical notes, of insubordination, and that they refused to honor her various transfer requests and to honor her light duty requests, as punishment or retaliation for her disability and request for a reasonable accommodation. Apparently (although her Complaint is not clear) Plaintiff asserts a retaliation claim under the ADA. The ADA provides that "[n]o person shall discriminate against any individual because such individual . . .

made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 1203(a). Our Court of Appeals has held that this section prohibits "retaliation against any individual who has asserted rights under the ADA." *See Sarno v. Douglas-Eliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 159 (2d Cir. 1999). Title VII provides that [i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [he or she] has opposed any practice made an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-3(a). Because the retaliation provisions under the ADA and Title VII are so similar, our Court of Appeals in *Sarno* instructed that the same approach in analyzing retaliation claims is used for both statutes. *See Sarno*, 183 F.3d at 159.

To prove a *prima facie* claim of retaliation under the ADA, Plaintiff must establish that (i) she was engaged in protected activity; (ii) Defendants were aware of that activity; (iii) that she suffered an adverse employment action and (iv) there existed a causal connection between the protected activity and the adverse employment action. *See id.* The protected activity Plaintiff engaged in was asking the Department for a reasonable accommodation. Persons with ADA qualified disabilities are entitled to reasonable accommodations. *See Lyons v. Legal Aid Society*, 68 F.3d 1512 (2d Cir. 1995). "[C]ourts generally have recognized that non-disabled individuals [such as Plaintiff here] who request reasonable accommodation are protected against retaliation, provided the request was made in good faith." *Keating v. Gaffney*, 182 F. Supp.2d 278, 287 (E.D.N.Y. 2001). *See also Sarno*, 183 F.3d at 159. Plaintiff asked Defendants for her reasonable accommodation thus they were aware of the activity. It is clear that Plaintiff meets the first two elements of her *prima facie* retaliation claim.

What is not clear, however, and what must be established by Plaintiff for this and her Title VII disparate treatment claim to survive, is whether she suffered an adverse employment action. An adverse employment action sufficient to support a retaliation claim is a materially adverse change in the terms, privileges, duration and conditions of employment. *See Tomes v. Pisano*, 116 F.3d 625 (2d Cir. 1997). "[A] material adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A material adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in salary, a less distinguished title, a material loss of benefits, significantly diminished material benefits or other indices that might be unique to a particular situation." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

Plaintiff contends that she suffered the following adverse employment actions when Defendants refused her light duty requests: (i) from May 1998 through December 1998 she was required to take unpaid sick leave and pay for her health insurance benefits; (ii) the Notes of Questioning, which did not result in disciplinary action; (iii) the memoranda accusing Plaintiff of violating Department policy and of insubordination; (iv) one memorandum accusing Plaintiff of failing to issue food stamps to a customer; and (v) the Department's delay in transferring her to another office.

None of these in the context of this case constitute adverse employment actions sufficient to sustain Plaintiff's retaliation claim. Plaintiff was unable to perform the essential functions of her job when she made her light duty request, thus, as discussed herein, Defendants were not required to honor it. The resulting fact that Plaintiff chose to stay home on unpaid sick leave from May through December does not constitute an adverse employment action taken by Defendants against

Plaintiff. Although Notes of Questioning and memoranda stating that Plaintiff violated Department policy were created, she was never disciplined, "[n]egative evaluations alone, without any accompanying adverse result, however, are not cognizable." *Valentine v. Standard & Poor's*, 50 F. Supp.2d 262, 283 (Sotomayor, J.) (S.D.N.Y. 1999). Defendants did not take disciplinary action against Plaintiff nor did they demote her, reduce her salary, fire her or change her job in anyway. In fact, Plaintiff received extended sick pay, unpaid sick leave and all the other benefits she was entitled to. Plaintiff's subjective belief that the record of disciplinary inquiry *may* hurt her chance to obtain a promotion in the future, do not make them material adverse employment actions.

Finally, Defendants failure to honor Plaintiff's transfer requests immediately do not constitute adverse employment actions. *See e.g. Oliveras v. Garage Management Corp.*, No. 99 Civ. 1352 (LAP), 2000 WL 1277321, *1, *4 (S.D.N.Y. 2000) (failure to transfer upon employee's request held not an adverse employment action because terms and conditions of employment remained the same); *Bunis v. Runyon*, 94 Civ. 2063 (JFK), 1997 U.S. Dist. LEXIS 16045, *1 *9-*11 (S.D.N.Y. 1997) (same). Plaintiff wanted to be transferred to the same position at a different location. Defendants decision not to transfer her upon her first request, did not alter any of the terms and conditions of her employment. She remained employed as an eligibility examiner, receiving the same salary, benefits, privileges and duties as before her requests.

Because Plaintiff did not suffer an adverse employment action, Defendants are entitled to summary judgement dismissing her ADA retaliation claim.

New York Human Rights Law Claim

Although Plaintiff did not assert a disability discrimination claim under Section 296 of the New York Executive Law in her Complaint, she moved to amend. At oral argument, this Court stated that it would treat Defendants' summary judgment motion as if it was made toward Plaintiff's amendment. Defendants contend they are entitled to summary judgment on Plaintiff's state law claim because Plaintiff did not file a timely Notice of Claim with the County as required under Section 52 of the County Law.[5] That section provides:

> any claim or notice of claim against a county for damage . . . of any name and nature . . . and any other claim for damages arising at law or in equity, alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in accordance with section fifty-e of the general municipal law.

County Law § 52(1). Section 50-e of the General Municipal Law provides:

> [i]n any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action . . . the notice of claim shall be served . . . within ninety days after the claim arises.

The New York Court of Appeals has instructed that these Notice of Claim provisions apply to claims where, as here, Plaintiff alleges employment discrimination. *See Mills v. County of Monroe*, 59 N.Y.2d 307 (1983).

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[5] Defendants also contend they are entitled to summary judgment because the statute of limitations has now run, as well as on the merits.

In *Mills*, the New York Court of Appeals also held hat "[w]hen an employment discrimination action is brought against a county under the State or Federal civil rights statutes, the failure to timely file a notice of claim shall be fatal unless the action has been brought to vindicate a public interest or leave to serve late notice has been granted by the court." *Mills*, 59 N.Y.2d at 308. Plaintiff concedes that she did not formally file a Notice of Claim with the County. Plaintiff contends however that she has complied with Section 52 of the County Law because she filed her EEOC Complaint against the County within the requisite time period and this provided the County with actual notice. "The statute, however, expressly sets forth particular notice requirements, and these are not satisfied by an EEOC filing." *McNeil v. Aguilos*, 831 F. Supp. 1079 1085 n.5 (S.D.N.Y. 1993). *See also Baker v. County of Monroe*, 47 F. Supp.2d 371,375 (W.D.N.Y. 1999) (rejecting the plaintiff's argument that she complied with the notice of claim provisions by filing an EEOC complaint). Thus, because Plaintiff's EEOC filing is insufficient and because Plaintiff's action was not commenced to vindicate a public interest, rather it was commenced to vindicate her own interests, and she never requested leave of this Court to serve late notice, Defendants are entitled summary judgment on Plaintiff's New York State claims.

Title VII Claim

Plaintiff brings Title VII claims against Defendants alleging, hostile work environment and disparate treatment based on her race. With respect to her disparate treatment claim, Plaintiff alleges that Defendants violated her rights under Title VII by refusing to transfer her out of the Yonkers District office based on her race. She contends that similarly situated Caucasian employees were routinely transferred, but she, a black woman, was not. To establish a *prima facie* disparate

treatment claim under Title VII, Plaintiff must show: (i) membership in a protected class; (ii) satisfactory job performance; (iii) termination from employment or other adverse employment action; and (iv) that the adverse action took place under circumstances giving rise to an inference of discrimination. *See Cruz v. Coach Stores, Inc.*, 202 F.23d 560, 567 (2d Cir. 2000); *Boyd v. Presbyterian Hospital in the City of New York*, 160 F. Supp.2d 522, 535(S.D.N.Y. 2001). As discussed herein, Plaintiff has not suffered an adverse employment action sufficient to prove her *prima facie* claim. Defendants are therefore entitled to summary judgment on Plaintiff s Title VII disparate treatment claim.

With respect to Plaintiff's hostile work environment claim, she alleges that Defendant Hagen "engaged in a series of activities that created a hostile work environment for plaintiff on the basis of race and disability." Specifically, she claims that Defendant Hagen (i) refused to acknowledge that Plaintiff suffered from a disability; (ii) although instructed by her supervisor not to do so, Hagen continuously sent Plaintiff memoranda reprimanding her for failing to call the office each for each day she was absent; (iii) by recommending to her superiors that Plaintiff not be reasonably accommodated for her disability; (iv) falsely accusing Plaintiff of insubordination; (v) falsely accusing Plaintiff, after she returned to work, of disparaging Hagen because she is gay; (vi) intentionally spraying perfume while knowing it aggravated her impairment; and (vii) threatening to bring section 75 charges against her.

"In order to survive summary judgment on a claim of hostile work environment harassment a plaintiff must produce evidence that 'the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment.'" *Cruz*, 202 F.3d at 570 (internal citations omitted). The only evidence Plaintiff sets forth in support of this claim

is the fact that Caucasian were provided new positions when they applied for them. This Court has found no evidence that the Yonkers District Office was permeated with "discriminatory intimidation, ridicule or insult." Indeed, everyone in that office besides Defendant Hagen, was African-American or Hispanic. With respect to Plaintiff's hostile work environment claim based on disability, Title VII does not provide for such protection: "[i]t shall be unlawful employment practice for an employer (1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employments because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a). As such, Defendants are entitled to summary judgment on Plaintiff's Title VII hostile work environment claim.

Equal Protection Claim

To state a claim under section 1983, a plaintiff must allege that Defendants acted under color of state law and their actions denied her federal statutory or constitutional rights. *See Annis v. County of Westchester*, 136 F.3d 239, 245 (2d Cir. 1998); *Querry v. Messar*, 66 F. Supp.2d 563, 569 (S.D.N.Y. 1999). Plaintiff here alleges that Defendants, a County employer and employee, violated her Constitutional right to equal protection by treating her unlike similarly situated Department employees when they failed to honor her requests for a transfer and for a light duty assignment.

"The Equal Protection Clause of the Fourteenth Amendment is essentially a directive that all persons similarly situated should be treated alike." *Brown v. City of Oneonta*, 221 F.3d 329, 336 (2d Cir. 2000). To prove a race based Equal Protection claim, Plaintiff must prove, that (i) compared with others similarly situated, she was treated adversely, and (ii) such adverse treatment was motivated by intention to discriminate on basis of impermissible considerations, such as race "to punish or inhibit exercise of constitutional rights

or by maliciousness or bad faith to injure person." *Capasso v. Metropolitan Transportation Authority of State N.Y.*, __ F. Supp.2d __, 2002 WL 549954, *1, *7 (S.D.N.Y. 2002).

Plaintiff was not similarly situated with others who received transfers or new job positions because the evidence demonstrates that those person specifically applied for open positions and were assigned to other locations as a result of those applications. For example, Craig Lebowitz, Mark DeNicholas and Tom Reiger, all submitted applications in response to job postings, were evaluated for those specific job openings, and were thereafter reassigned. Josie Hague, an African-American female, was selected in May 1999 from a competitive civil service list for Eligibility Examiner and was given a contingent permanent appointment in the White Plains District Office pursuant to her choice of location. Plaintiff, in contrast, merely requested a generic transfer and never specifically responded to a job posting nor applied for a different position. Plaintiffs conclusory statement that these persons "were similarly-situated as they sought an open position," is insufficient to prove her Equal Protection claim. Defendants are therefore entitled to summary judgment on this claim.

Conclusion

Based on the foregoing Defendants' motion for summary judgment is granted, deemed directed to the proposed amended complaint. The Clerk of Court shall file a final judgment.

SO ORDERED.

Dated: White Plains, New York
May 20, 2002

CHARLES L. BRIEANT

Charles L. Brieant, U.S.D.J.